APPENDIX A

IN THE UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

No. 14005 SEPTEMBER TERM, 1963, SEPTEMBER SESSION, 1963

UNITED STATES OF AMERICA, *Plaintiff-Appellee,*

v.

LYNDON A. DURANT, *Defendant-Appellant.*

Appeal from the United States District Court
for the Northern District of Illinois, Eastern Division

November 6, 1963

Before HASTINGS, *Chief Judge*, and SCHNACKENBERG and CASTLE, *Circuit Judges.*

SCHNACKENBERG, *Circuit Judge.* Lyndon A. Durant, defendant, having been indicted under 26 U. S. C. A. § 7201 and charged in three counts with willfully attempting to defeat and evade a part of income tax due and owing by him and his wife to the United States of America, for the calendar years 1954, 1955, 1956, the deficiency totaling $142,714.40, pleaded not guilty and was tried by the court without a jury.

The court having denied defendant's motions for judgment of acquittal at the close of the government's case and at the close of all the evidence, defendant was found guilty on each count and judgment was entered accordingly. Defendant was sentenced to the custody of the attorney general for a period of 60 days on each count, the sentences to run concurrently, and fined $15,000 and costs. From said judgment defendant appealed to this court.

According to the stipulated proof, unreported income totaling $212,328.97 upon which the tax deficiency for the three years is computed, was derived from corporate expenditures of United Manufacturing Company, an Illinios

corporation, Chicago, Illinois, made for the personal benefit of taxpayer. The immediate beneficiaries of these expenditures, other than defendant personally, are identified in the stipulations. These expenditures numbered 2572 and involved the issuance of 686 corporate checks. They were charged chiefly to corporate expense accounts for travel, automobile, entertainment and selling, and also to freight, office expense, engineering, contributions, professional services, factory expense, office equipment, dues and subscriptions, rent and advertising.

Government exhibits 4, 5, 6 set forth separately each of said expenditures for the years 1954, 1955 and 1956 respectively. Abbreviations used in these exhibits are explained as follows:

RT—Round Trip
OW—One Way
CHGS—Charges
AC—Account
PR—Pair
BRA—Brassiere
CTN—Carton
W-W—Wall to Wall
BEV—Beverages
HH—Household
PYMT—Payment

The government contends that this $212,328.97 was, and that defendant knew it to be, income, and the district court so found.

None of these items was charged to the personal account of taxpayer, which was carried on the corporate books under the title "L. A. Durant". It appears that this account had been maintained since the incorporation of United and even prior thereto during the period 1943 to 1946, when the business was operated as a sole proprietorship. During the entire prosecution period 1954-1956, this ac-

count was charged only three times for a total of $2,700.26 with purchases from the vendors who supplied the 2572 stipulated items involving the amount of the income not reported by defendant upon which this case rests. The government points out that, while there is evidence that defendant from time to time had given instructions on charging items to this account, there is no evidence cited to us that he ever gave explicit instructions to any corporate employee how to charge any of the 2572 items in issue. We have found none.

The government's position is that defendant knew that these items would not be charged to his account in the absence of instructions from him, that he intended they should be charged to corporate expense accounts, that he knew they constituted income to him and that he willfully suppressed this additional income to him in his joint income tax returns. The trial court so found, and the government submits its findings are amply supported by the evidence.

On the other hand, defendant insists that he had assumed that all items paid by the corporation for his personal benefit were being charged to his personal account. Although he testified that he could not recall telling anyone specifically to make a charge to his personal account, he testified that, if he made any withdrawals from the corportion, it was his understanding that he would have to repay them.

H. L. Oettinger, an experienced accountant, in 1946 was hired by defendant as overseer of the office. He had the responsibility of seeing that the distribution of expenses was proper. To him defendant delegated the administrative end of the business. In July of 1951 Walter B. Taibleson, a certified public accountant, became comptroller of United. He prepared tax returns for the years 1951 through 1955.

According to Frances Croson, the accounts payable clerk, two routines were used for handling bills. Generally they were received, analyzed and classified for distribution to the proper account and paid by check on a weekly basis, with the assistance of a National Cash Register office machine. The alternative routine was to expedite particular items on an individualized basis, in which case the checks were typed out as needed, and distributed once a month to various corporate accounts. These so-called "typed checks" had a detachable bottom portion for purposes of recording the expenditure as to payee, nature of purchase, classification, etc. Carl Olson, purchasing agent, received the bulk of the purchase bills for purpose of noting the proper account distribution. Other bills went to the specific persons to whom addressed or who were responsible for a particular account.

On classification questions, according to Miss Croson, in 1950 more bills without any indication as to distribution began coming through to her; that, prior to that, the number of bills, without any indication as to distribution was negligible; that some of the bills came to her and some to Oettinger, who would hand them to her; that, in the beginning, she would ask Oettinger how such bills would be distributed, and he invariably replied, "Use your best judgment"; that she never discussed procedures with defendant. During 1948, the bills generally came to her already bearing a notation of the proper account distribution. When items such as Marshall Field, Saks Fifth Avenue and Bonwit Teller, became larger and more numerous, she asked Oettinger, who told her to "handle them as best you can" and she distributed them as similar items had been handled before. Defendant, and Oettinger also, would ask her to make out "typed checks" to various persons, but neither ever told her how to charge them.

Occasionally it was defendant's practice to give bills to Taibleson or to Oettinger for payment, but not to indicate

how such bills should be charged. However, defendant did at times give instructions to charge himself personally or to a corporate project called "Caravan", based at Denver, which was engaged in development of electronic devices in connection with drilling of wells. In the absence of any such indication, the practice was to charge an expenditure to a corporate expense account.

As to many of the indictment items, defendant instructed his employees personally either to issue a check and return it to him; to issue a check in payment of a bill, where the only documentation of such bill was defendant's oral direction; to draw petty cash and give the funds to him; or to purchase merchandise for him to be disposed of at his personal direction or shipped where he designated. Defendant never did explain to employees that such items, all of which were herein stipulated as personal, were not business expenses but were personal to him.

Defendant also took blank checks with him on trips out of the city and, according to custom, needed no one's authority to do this. On occasion, he returned the bottom half of the check to the bookkeeping department. Of those items in evidence of such a nature, in only two instances did he indicate the purpose on the voucher portion as shown in the following two paragraphs. In all other instances he made no indication of the purpose for which the check was written. If Durant did not furnish this bottom half, or voucher portion, not only was there no way of knowing the purpose for which it was drawn, but the company was unaware it was issued until it cleared the bank.

Government exhibit 713 is a corporate check dated May 19, 1956, written by defendant in the amount of $576 to the order of John Engstead. The bill was incurred by Cynthia Brooks for photographs. Defendant entered the notation "Comm. Photo" on the voucher attached to the bottom of the check form and the item thereafter was entered to "office expense". Defendant on cross-exami-

nation said "Commerical Photo" may have been the name of the company and that he did not remember why he put on this notation.

Exhibit 357 is a corporate check written to cash by defendant on June 18, 1954, in the amount of $2,000 and given to Dorothy Raynor. Defendant admittedly made the notation "Spfld Ill—Eagle River Trip" on the voucher portion of the check and the item was thereafter charged to "travel expense". Defendant acknowledged the endorsement on this check was by Dorothy Raynor and that he "must have" given it to her. Although the item was stipulated as personal, defendant said this thought had not occurred to him.

Reports of business conditions were prepared daily and weekly and were submitted to defendant in that order. Defendant admittedly received them daily when in Chicago and by mail when absent.

Government exhibit 1086 snows that check disbursements for defendant's personal benefit and so charged to his L. A. Durant account, were substantially all reflected on the daily reports with the designation "L. A. D." in the portion entitled "Disbursement Summary". Defendant testified this notation "L. A. D." on daily report items meant that they were being charged to his personal account.

Exhibit 1087 is a sample daily report for July 26, 1956, which, in the summary of disbursements portion, contains the following entry "L. A. D. CKS. of 6-27 * * * Travel Exp. 9,500.00. This $9,500 is the sum of exhibits 141 and 143. Exhibit 141 is a $3,000 check to cash dated June 27, 1956. Exhibit 143 is a $6,500 check issued by defendant to a Honolulu jewelry firm on June 27, 1956, in payment for pearl jewelry purchased by defendant as gifts for friends. The $9,500 was charged to corporation "travel expense".

As the government points out, of a total of $56,304.95 in check disbursements charged to the L. A. Durant account in 1956, the daily reports reflect $55,124.63. This

$56,304.95 was effected by the issuance of 25 checks, whereas 319 checks were issued to effect the personal disbursements stipulated in government exhibit 6 during 1956, none of which appeared in the daily reports as "L. A. D." account charges. These figures have not been questioned by defendant.

In 1951, agent Zivin examined United's and defendant's returns for 1949 and 1950. He made no third-party investigation of certain unsubstantiated expenses disallowed to the corporation, and also could not readily determine from the corporate books which were items of expenditure made for the benefit of defendant. He reviewed these items several times with Oettinger and Durant to determine their true nature. In December 1951, in a final conference Zivin so stated to Oettinger and defendant, with a warning that this practice had to be stopped, to which defendant replied, that if it had been done it was a mistake and that the items should have been charged to his personal account.

Zivin's itemized report of the corporation's personal and unsubstantiated expenses which he charged to defendant, showed the following totals:

L. A. Durant

	Personal	No Substantiation
1949	$ 3,055.50	$47,400.00
1950	39,534.71	74,342.86

Zivin charged both categories to defendant as dividends. Sworn protests were filed in which defendant alleged that, with the exception of nine items, all disallowed expenses were exclusively devoted to official corporate expense by defendant.

The case was reassigned to revenue agent Wagar, who consulted Zivin's reports and examined the years 1951, 1952 and 1953. Without any third-party investigation, Wagar perpared reports dated April 26, 1954, proposing

certain adjustments covering the years 1949 through 1953, and disallowing to the corporation certain of the expenses claimed and charging to defendant as dividends certain amounts for each year. Before submitting his report, Wagar discussed with defendant the practice of taking corporate tax deductions for personal expenditures and said this practice was improper. Defendant did not explain how they came to be charged to corporate expense accounts. Wagar's report contained an itemized listing of corporate expense items determined to be personal in nature. Defendant discussed with the comptroller, Taibleson, the selling and travel expenses disallowed by Wagar.

The proposed assessments were settled by agreements for payments of additional corporate and personal taxes, totaling about $600,000.

Thereafter, defendant's personal expenditures continued to be paid by and charged to the corporation. During 1954, 1955 and 1956, $79,104.95 in personal items was actually disbursed to vendors who had been identified with dividend items charged to defendant in the prior audits. Defendant admitted that he made no changes in the accounts payable routine.

Defendant himself testified that in 1951 or 1952 he met with Agent Zivin and that, some unfixed date in 1954, he had a conversation with Agent Wagar. He admitted that there was a discussion with Zivin about personal items that the corporation had paid for. He "assumed" that he knew what the discussion with Zivin "was all about."

He testified that he read and signed a protest against Zivin's ruling, prepared by his lawyers.

1. We first dispose of the contention of defendant that, if he had an intent to repay United Manufacturing Company for personal expenses paid by it on his behalf, the fact that they were not charged to his personal account has no effect, but they are loans. He cites *Estate of Helene*

Simmons, 26 T. C. 409 (1956), *Carl L. White*, 17 T. C. 1562 (1952), and *Walter Freeman*, 16 T. C. M. 71 (1957).

In the case at bar, the district court found that the record is clear that at no time were the payments in question ever considered as loans by the parties. The corporation did not carry them on its books as notes or accounts receivable; no notes or other evidence of loans were ever executed by the defendant; no interest was ever paid to the corporation by the defendant; no maturity or repayment date was set; no repayment was made; defendant never advised any of the responsible subordinates that the payments were to be treated as loans and charged to his personal account; in fact, no action was taken by either the defendant or the corporation which would indicate that the payments were loans.

The district court found that the payments made by the corporation in the taxable years for defendant's benefit were income to defendant, which was known to defendant. This finding is supported by the uncontradicted evidence in the record, most of it stipulated.

Accordingly we hold that the payments by the corporation for the benefit of defendant were not loans by it defendant, but were income.

2. Defendant insists that the statute here involved, 26 U. S. C. A. § 7201, requires proof of willfulness by the defendant.

That section reads:

> Any person who willfully attempts in any manner to evade or defeat any tax imposed by this title or the payment thereof shall, in addition to other penalties provided by law, be guilty of a felony * * *.

Defendant submits that the most that can be inferred from the evidence in this case is a certain amount of laxity,

but his counsel urges that any amount of laxity does not constitute the requisite willfulness.

As an abstract proposition, we would agree that no amount of laxity in and of itself constitutes willfulness. However, in the case at bar, we believe that the district court properly recognized the additional factors revealed by the records, tending to prove a willful intent: (a) defendant knew the corporation was paying his expenses, (b) the payments were not considered loans by the parties, (c) defendant knew the corporate payments were income to him; and therefore properly found that defendant willfully failed to include them in his returns.

As we have indicated, the events following the prior audits for 1949-1953 served to clearly warn defendant of his duty to report as his personal income the charges of indebtedness incurred by him and paid by the corporation. Moreover, his failure to indicate on many of the expenditure vouchers any notation indicating appropriate classifications leading to a proper charge to him personally, also tends to support the finding of willfulness.

His continuous failure to see that the warnings of Zivin and Wagar were heeded might reasonably be expected to result in a continuation of the practice of charging his personal obligations to the corporation.

We are not concerned here with any ethical question as to the propriety of defendant's benefactions to various ladies. No requirement of federal tax laws bars such nurture of cordial relations with them. Yet the court, as the trier of the facts, had a right to consider the repeated charges to the corporation for gifts by defendant to feminine acquaintances despite the previous warnings, and to find that he had deliberately and willfully continued to permit the making of such improper charges. By the sequence of events, the continuation of that practice, which in prior years may have resulted from defendant's negli-

gence, in the years 1954, 1955 and 1956 became deliberate and willful.

Whether defendant willfully attempted to defeat and evade taxes in this case presented a question for the trier of the facts. There was substantial evidence before the court to support the result which it reached. The credibility of defendant as a witness and the weight to be given to his testimony were peculiarly within the knowledge of the court, which had an opportunity to observe his demeanor while testifying. On appeal, we are forced to hold, as we do, that there was sufficient evidence viewed in the light most favorable to sustain the court's finding, to prove the charge upon which defendant was tried. *Blauner* v. *United States*, 8 Cir., 293 F. 2d 723, 725 (1961); *United States* v. *Dudley*, 2 Cir., 260 F. 2d 439, 440 (1958); *United States* v. *Tutino*, 2 Cir., 269 F. 2d 488, 490 (1959). Cf. *Wolfe* v. *United States*, 6 Cir., 261 F. 2d 158, 160 (1958).

For these reasons, the judgment from which defendant has appealed is affirmed.

JUDGMENT AFFIRMED.

A true Copy:
Teste:

Clerk of the United States Court of Appeals for the Seventh Circuit.

UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

Chicago 10, Illinois

Wednesday, November 6, 1963

Before:

HON. JOHN S. HASTINGS, *Chief Judge*
HON. ELMER J. SCHNACKENBERG, *Circuit Judge*
HON. LATHAM CASTLE, *Circuit Judge*

No. 14005

UNITED STATES OF AMERICA, *Plaintiff-Appellee,*

v.

LYNDON A. DURANT, *Defendant-Appellant.*

Appeal from the United States District Court
for the Northern District of Illinois, Eastern Division

This cause came on to be heard on the transcript of the record from the United States District Court for the Northern District of Illinois, Eastern Division, and was argued by counsel.

On consideration whereof, it is ordered and adjudged by this court that the judgment of the said District Court in this cause appealed from be, and the same is hereby, AFFIRMED, in accordance with the opinion of this Court filed this day.

APPENDIX B

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

No. 61 CR 260

UNITED STATES OF AMERICA, *Plaintiff*,

v.

LYNDON A. DURANT, *Defendant*.

Special Findings of Fact and Opinion

This Court, sitting without a jury, having heard all of the testimony, examined all the evidence, the indictment numbered 61 CR 260, the bill of particulars, the stipulations of the parties filed of record, and the written and oral arguments of counsel in this cause, upon request of the defendant, pursuant to rule 23(c), Federal Rules of Criminal Procedure, hereby finds the following facts to be true:

1. On April 15, 1955, the defendant Lyndon A. Durant, filed and caused to be filed with the District Director of Internal Revenue for the Chicago Internal Revenue District, at Chicago, Illinois, a joint income tax return on behalf of himself and his wife, Kathleen Durant, for the calendar year 1954, which return was prepared by Herbert L. Oettinger and signed by the defendant. The total income tax paid by the defendant for the calendar year 1954 was $132,953.48, the amount of tax stated in the said return to be due and owing upon the stated joint taxable income of $273,802.81 of him and his wife, which joint taxable income was earned and/or derived by him in the said calendar year.

2. On April 9, 1956, the defendant Lyndon A. Durant, filed and caused to be filed with the District Director of Internal Revenue for the Chicago Internal Revenue District, at Chicago, Illinois, a joint income tax return on behalf of

himself and his wife, Kathleen Durant, for the calendar year 1955, which return was prepared by Herbert L. Oettinger and signed by the defendant. The total income tax paid by defendant for the calendar year 1955 was $29,136.15, the amount of tax stated in the said return to be due and owing upon the stated joint taxable income of $64,332.54 of him and his wife, which joint taxable income was earned and/or derived by him in the said calendar year.

3. On April 15, 1957, the defendant Lyndon A. Durant, filed and caused to be filed with the District Director of Internal Revenue for the Chicago Internal Revenue District, at Chicago, Illinois, a joint income tax return on behalf of himself and his wife, Kathleen Durant, for the calendar year 1956, which return was prepared by Bansley and Kiener, certified public accountants, and signed by the defendant. The total income tax paid by the defendant for the calendar year 1956 was $31,859.87, the amount of tax stated in the said return to be due and owing upon the stated joint taxable income of $72,346.08 of him and his wife, which joint taxable income was earned and/or derived by him in the said calendar year.

4. The United Manufacturing Company, an Illinois corporation (hereinafter called "United"), of which the defendant Lyndon A. Durant, was the President and sole stockholder, during each of the calendar years 1954, 1955 and 1956, made expenditures for or on behalf of the defendant and for his personal economic benefit in the following total amounts:

1954	$ 51,716.17
1955	66,877.19
1956	93,735.61

5. Each of the expenditures by United reflected in finding four hereof were either recorded in the records of United as expenses of the said corporation and deducted by the

said corporation as business expenses of the said corporation in each of its corporate income tax returns filed for the respective calendar years 1954, 1955 and 1956, or were recorded as an acquisition of an asset by the said corporation, which was thereafter depreciated by it and the said depreciation then deducted by the corporation on its income tax returns as an expense. None of the aforesaid expenditures in fact constituted an expense or acquisition of assets of United and were all of a personal economic benefit to the defendant.

6. Of the expenditures made by United reflected in finding four hereof, and all of which expenditures were of a personal economic benefit to the defendant in the calendar years 1954, 1955 and 1956, respectively, none were included in the amount of joint taxable income stated in the joint income tax returns filed by the defendant on behalf of himself and his wife for the calendar years 1954, 1955 and 1956, respectively.

7. The payments made by United in the years 1954 to 1956, referred to in finding four hereof, for the defendant's personal economic benefit were income to the defendant in each of the respective amounts for each of the respective years.

8. The defendant, Lyndon A. Durant, as President of United, was its chief executive officer as well as its chief engineer, designer and electronic specialist. He delegated authority for the supervision of the administrative affairs of the corporation to Herbert L. Oettinger, Vice President of the corporation, who was responsible for the keeping of all corporate books of account during the years 1954, 1955 and 1956. During the years 1954, 1955 and 1956, the corporation employed one, Walter Taibleson, a certified public accountant, as controller, who was subordinate to Oettinger, the Vice President, as was Miss Frances Croson, who was in charge of the accounts payable.

9. The books of account of the corporation contained an account entitled "L. A. Durant." During the years 1954, 1955 and 1956, United made expenditures for or on behalf of the defendant for his personal use and benefit aggregating $815,021.08 of which $602,692.11 was charged to the personal account entitled "L. A. Durant" and the agreegate of $212,328.97 reflected in finding four hereof was charged as set forth in finding five hereof.

10. Commencing in December 1951, the corporate income tax returns of United for the years 1949 and 1950 were examined by Internal Revenue Agent Alfred E. Zivin. Agent Zivin questioned four general categories of items in the corporation's books and records of account, one of which was the use of corporate funds for personal expenses. In connection with his audit of the corporation's returns, Agent Zivin had several conferences at which both the defendant and Oettinger were present and in which the question of charging personal expenses to the corporation was discussed. On December 23, 1951, Agent Zivin had a final conference with the defendant and Oettinger, at which all four categories of items were discussed and the agent advised the defendant and Oettinger the the practice of charging personal expenses to the corporation should be stopped. The defendant replied that if there were personal expenses charged to the corporation, they should be charged to his personal account.

11. In February of 1954, a second Internal Revenue Agent, William H. Wagar, examined the returns of United for the years 1949 through 1953. He too questioned the same four general categories which Agent Zivin had raised and disallowed substantial personal expenses of the defendant which had been charged to the corporation in each of the five years. Agent Wagar likewise had conferences with the defendant and Oettinger during the course of which he informed the defendant that it was improper for him to charge personal expenses to the corporation al-

though Agent Wagar did not discuss the specific items with the defendant but discussed them with Oettinger.

12. Neither the defendant nor anyone else instructed the controller Taibleson to make any changes in the bookkeeping and accounting practices of the corporation after either agent's examination. On a number of occasions, the defendant brought invoices and bills to Taibleson and directed him to pay the same without designating any account to which they were to be charged. In the absence of a specific direction by defendant to charge a particular item to his personal account, it was the established practice of the corporation to charge such items to various corporate accounts.

13. On a number of occasions during the years 1954 through 1956 the defendant instructed the purchasing agent of the corporation, Carl J. Olson, to purchase merchandise for him. Ordinarily there would be no formal requisition or purchase order and the merchandise would be disposed of as directed by the defendant. On no occasion did the defendant instruct Olson to charge the purchases to his personal account and, pursuant to the established practice of the corporation, Olson charged such purchases to various corporate accounts. On some occasions the defendant would instruct Olson to make purchases for a separate corporate project which was known as "Caravan" and the defendant would indicate that such purchases were to be charged to the Caravan account.

14. The defendant knew at the time he filed his income tax returns for each of the years 1954 to 1956, respectively, that he had taxable income as a result of the payments made by United for his personal economic benefit as set forth in finding four hereof.

15. Each of the income tax returns filed by the defendant for the years 1954 to 1956, as set forth in findings 1, 2 and 3 hereof, were false when filed by the defendant and

the defendant knew them to be false at the time of their filing.

16. The defendant wilfully and knowingly attempted to evade and defeat a part of the income tax due and owing by him and his wife to the United States of America for each of the years 1954, 1955 and 1956 respectively, by knowingly and intentionally filing false and fraudulent joint income tax returns on behalf of himself and his wife, Kathleen Durant, wherein, in each of the said returns, he knowingly and intentionally falsely stated their joint taxable income and the income tax due and owing thereon. This conduct on the part of the defendant constituted, in each of the years 1954, 1955 and 1956, a violation of section 7201, Internal Revenue Code of 1954, 26 U.S.C. section 7201.

Wherefore, the Court finds the defendant, Lyndon A. Durant, guilty as charged in each of Courts 1, 2 and 3 of indictment 61 CR 260.

OPINION

The defendant, Lyndon A. Durant, is charged in a three count indictment with a wilful and knowing attempt to evade and defeat the income taxes due and owing for himself and his wife for each of the years 1954, 1955 and 1956, by causing to be filed false and fraudulent income tax returns for each of such years, in violation of section 7201 of the Internal Revenue Code of 1954, 26 U.S.C. section 7201.

It has been stipulated by the parties that the United Manufacturing Company (hereinafter called "United"), of which the defendant was the sole stockholder and principal executive officer during the years 1954, 1955 and 1956, made expenditures for or on his behalf and for his personal economic benefit in an aggregate amount of $212,328.97 as follows:

1954	$ 51,716.17
1955	66,877.19
1956	93,735.61

It has been further stipulated that all of these items were charged to various corporate accounts and that none of them were reported as income by the defendant and his wife in their joint returns for the years in question. During the same period the corporation made additional expenditures for or on behalf of the defendant and for his personal economic benefit in an aggregate of $602,692.11 which were charged to a personal account on the books of the corporation entitled "L. A. Durant."

On behalf of the defendant, it is urged that while there is no dispute that the $212,328.97 was paid for his personal benefit by the corporation and charged to corporate accounts during the relevant years, this was done without his personal knowledge, and he assumed that these items, together with the $602,692.11, were all being charged to his personal account. Accordingly, it is contended that (1) the amounts in question were loans and did not constitute income to the defendant and (2) he lacked the requisite criminal intent to sustain a conviction under the applicable section of the Internal Revenue Code.

With respect to the first contention, the record is clear that at no time were the payments in question ever considered as loans by the parties. The corporatin did not carry them on its books as notes or accounts receivable; no notes or other evidence of loans were ever executed by the defendant; no interest was ever paid to the corporation by the defendant; no maturity or repayment date was set, no repayment was made; defendant never advised any of the responsible subordinates that the payments were to be treated as loans and charged to his personal account; in fact, no action was taken either by the defendant or the corporation which would indicate that the payments were loans.

If the defendant intended these transactions to be loans, it behooved him to insure that the corporate records so reflected them. Otherwise, there would be no way in which the corporation could ever know what amounts were owed to it. Where, as here, substantial amounts are charged to a personal loan account at the instructions of the principal officer and sole stockholder, the only possible inference is that additional items not so charged because he gave no such instructions were not intended to be and were not loans.

The second question, that of whether or not the defendant had the requisite intent, presents in and of itself, two questions, first, whether he knew that the corporation was paying his personal expenses, and, second, if he did, whether he knew that such items were income to him which should have been included in his personal income tax return and wilfully or deliberately failed to include them therein.

In support of the contention that he did not know the corporation was paying his personal expenses, the defendant has introduced testimony establishing that although he was the principal executive officer of the corporation, he delegated the responsibility for the maintenance of the books and records and the administration of the company's office to subordinates on whom he relied for the proper handling thereof.

The record also discloses that the defendant had been advised by two internal revenue agents, who audited the corporation's and the defendant's income tax returns for prior years, that the charging of personal expenses to corporate expense accounts was improper and should be stopped but that the defendant did not instruct his subordintes to make any changes in the established and long-standing corporate practice. That practice was to charge any bill or invoice submitted by the defendant to a corporate account unless he specifically designated that it should

be charged otherwise. There is, however, no evidence that the defendant at any time instructed his subordinates to adopt this practice and to charge his personal expenses to corporate accounts.

It is difficult to believe, though, that the defendant was unaware of what was actually taking place. It has been stipulated, for example, that during the years in question he gave credit cards on various petroleum companies such as Standard Oil, Shell, Phillips, Pure Oil, etc., to his wife, his sister and a number of personal friends, authorizing them to make purchases to be charged to the account of the corporation. Similarly, he instructed the purchasing agent of the corporation to make numerous purchases of merchandise unrelated to the business activities of the corporation and to be delivered to relatives and personal friends while at no time instructing that such purchases be charged to him personally. The substantial number and volume of such transactions alone, two thousand five hundred and seventy-two in the three years, compel the conclusion that the defendant was aware of them and the manner in which they were being handled on the corporation's books.

In addition to the foregoing, the defendant on a number of occasions personally issued corporate checks to pay for his personal expenses with either no indication on the voucher poriton thereof that they were personal or, in some instances, made notations such as "commercial photos" or "Springfield, Illinois—Eagle River Trip" which were suscept ble of the interpretation that they were proper corporate expenses. Nor did he ever advise his subordinates that any of such checks were in fact personal.

There remains then the question of whether defendant knew that the payments by the corporation for his personal benefit were income to him which he wilfully or deliberately failed to include in his personal returns for the years 1954-1956. That such payments were, in law, income

to the defendant must likewise have been known by him since they were similar in nature to the more than $105,000.00 of disallowed corporate expenses previously charged to him as income by the revenue agents in their audits of the years 1949 through 1953.

Intent or wilfulness is, of course, a subjective fact and may be determined either from direct proof of statements or acts or by inference from circumstantial evidence. *U. S. v. Paschen*, 7 Cir. 1934, 70 F. 2d 491.

It is elementary that negligence or carelessness are not sufficient to constitute the requisite criminal intent. *Gaunt v. U. S.*, 1 Cir. 1950, 184 F. 2d 284. Nor can intent be infererd from the mere understatment of income or from the failure to report income which is not commonly recognized as such in the normal affairs of men. *U. S. v. Bridell, et al.*, D.C. N.D. Ill. 1960, 180 F. Supp. 268.

Defendant here, however, after being warned by two revenue agents that the charging of personal expenses to corporate accounts and the failure to report such items as income in his joint returns was improper, made no change whatsoever in the challenged practices. What may have been negligence or mere understatement of income in the earlier years can hardly be so considered in later years after the agents' warnings. The only reasonable inference from defendant's conduct is that he deliberately and wilfully continued practices which he had been advised were improper and the effect of which was substantially to understate his taxable personal income.

There is a point of repetition at which action originally careless or negligent becames deliberate and wilful. The defendant passed that point when, after warnings by two revenue agents, he did nothing but continue the improper and challenged practices.

In the light of all of the foregoing, I am satisfied beyond a reasonable doubt that the defendant is guilty as charged

in each of the three counts of the indictment. Judgment will be entered accordingly.

ENTER:

/s/ HUBERT L. WILL
Judge

Dated: October 1, 1962